

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Oct 23, 2015**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TROY CARPENTER,

Plaintiff,

v.

TIMOTHY THRASHER, WILLIAM RILEY,  
JERRY SCHUMAKER, REUBEN RIVERA,  
AND DOES 1-20,

Defendants.

No. 4:15-CV-05012-EFS

**ORDER GRANTING PARTIES' JOINT  
MOTION FOR A PROTECTIVE ORDER**

Before the Court is the parties' Joint Motion for a Protective Order, ECF No. 15. For the reasons stated below, the Court grants the parties' motion under the terms requested.

Discovery and disclosures in this action are likely to involve production of confidential, proprietary, or private information for which special protections may be warranted. The parties acknowledge that this stipulation is consistent with Federal Rule of Civil Procedure 26(c). It does not confer blanket protection on all disclosures or discovery responses. The protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. It does not presumptively entitle parties to file confidential information under seal. Moreover, the stipulation does

1 not waive a party's right to object to production of any records  
2 where: (1) the information is subject to an evidentiary privilege; or  
3 (2) the information sought is not sufficiently material to overcome  
4 the government's compelling interests in inmate safety and prison  
5 security. *See U.S. v. Williams*, 791 F.2d 1383, 1387 (9th Cir. 1986).

6 **I. Confidential Material**

7 "Confidential" material may include some or all documents  
8 created and/or maintained by the Intelligence and Investigations  
9 network of the Washington State Department of Corrections as part of  
10 the network's efforts to document the existence of and regulate the  
11 activities of security threat groups operating within the State's  
12 institutions. Confidential material may also include some or all  
13 digital video and/or audio recordings captured by the Department of  
14 Corrections' institutional surveillance systems. *See generally Fischer*  
15 *v. State*, 160 Wn. App. 722 (2011). Confidential material may also  
16 include some or all of Carpenter's medical records including mental  
17 health, chemical dependency, or sexually transmitted disease records.

18 **II. Scope**

19 The protections conferred by this agreement cover not only  
20 confidential material (as defined above and agreed to by the parties),  
21 but also (1) any information copied or extracted from confidential  
22 material; (2) all copies, excerpts, summaries, or compilations of  
23 confidential material; and (3) any testimony, conversations, or  
24 presentations by parties or their counsel that might reveal  
25 confidential material. However, the protections conferred by this  
26

1 agreement do not cover information that is in the public domain or  
2 becomes part of the public domain through trial or otherwise.

3 **III. Access and Use of Confidential Material**

4 A receiving party may use confidential material that is  
5 disclosed or produced by another party or by a non-party in connection  
6 with this case only for prosecuting, defending, or attempting to  
7 settle this litigation. Confidential material may be disclosed only to  
8 the categories of persons and under the conditions described in this  
9 agreement. Confidential material must be stored and maintained by a  
10 receiving party at a location and in a secure manner that ensures that  
11 access is limited to the persons authorized under this agreement.

12 Unless otherwise ordered by the court or permitted in writing by  
13 the designating party, a receiving party may disclose any confidential  
14 material only to:

- 15 a) the receiving party's counsel of record in this action,  
16 as well as employees of counsel to whom it is reasonably  
17 necessary to disclose the information for this  
18 litigation;
- 19 b) the officers, directors, and employees (including in  
20 house counsel) of the receiving party to whom disclosure  
21 is reasonably necessary for this litigation, unless the  
22 parties agree that a particular document or material  
23 produced is for Attorney's Eyes Only and is so  
24 designated;
- 25 c) experts and consultants to whom disclosure is reasonably  
26 necessary for this litigation and who have signed the  
"Acknowledgment and Agreement to Be Bound" (Exhibit A);
- d) the court, court personnel, and court reporters and  
their staff;
- e) copy or imaging services retained by counsel to assist  
in the duplication of confidential material, provided  
that counsel for the party retaining the copy or imaging  
service instructs the service not to disclose any

1 confidential material to third parties and to  
2 immediately return all originals and copies of any  
confidential material;

3 f) during their depositions, witnesses in the action to  
4 whom disclosure is reasonably necessary and who have  
5 signed the "Acknowledgment and Agreement to Be Bound"  
6 (Exhibit A), unless otherwise agreed by the designating  
7 party or ordered by the court. Pages of transcribed  
deposition testimony or exhibits to depositions that  
8 reveal confidential material must be separately bound by  
9 the court reporter and may not be disclosed to anyone  
except as permitted under this agreement;

g) and the author or recipient of a document containing the  
information or a custodian or other person who otherwise  
possessed or knew the information.

10 Except by advance written agreement of the parties, no  
11 confidential information may be disclosed to any incarcerated  
12 individual or individual identified with a security threat group,  
13 including the Plaintiff Troy Carpenter, unless that individual is the  
14 original source of the confidential information.

15 Before filing confidential material or discussing or referencing  
16 such material in court filings, the filing party shall confer with the  
17 designating party to determine whether the designating party will  
18 remove the confidential designation, whether the document can be  
19 redacted, or whether a motion to seal or stipulation and proposed  
20 order is warranted.

#### 21 **IV. Designating Confidential Material**

22 Each party or non-party that designates information or items for  
23 protection under this agreement must take care to limit any such  
24 designation to specific material that qualifies under the appropriate  
25 standards. The designating party must designate for protection only  
26 those parts of material, documents, items, or oral or written

1 communications that qualify, so that other portions of the material,  
2 documents, items, or communications for which protection is not  
3 warranted are not swept unjustifiably within the ambit of this  
4 agreement.

5 Mass, indiscriminate, or routinized designations are prohibited.  
6 Designations that are shown to be clearly unjustified or that have  
7 been made for an improper purpose (e.g., to unnecessarily encumber or  
8 delay the case development process or to impose unnecessary expenses  
9 and burdens on other parties) expose the designating party to  
10 sanctions.

11 If it comes to a designating party's attention that information  
12 or items that it designated for protection do not qualify for  
13 protection, the designating party must promptly notify all other  
14 parties that it is withdrawing the mistaken designation.

15 Except as otherwise provided in this agreement, or as otherwise  
16 stipulated or ordered, disclosure or discovery material that qualifies  
17 for protection under this agreement must be clearly so designated  
18 before or when the material is disclosed or produced.

19 (a) Information in documentary form: (e.g., paper or  
20 electronic documents and deposition exhibits, but excluding  
21 transcripts of depositions or other pretrial or trial  
22 proceedings), the designating party must affix the word  
23 "CONFIDENTIAL" to each page that contains confidential  
material. If only a portion or portions of the material on  
a page qualifies for protection, the producing party also  
must clearly identify the protected portion(s) (e.g., by  
making appropriate markings in the margins).

24 (b) Testimony given in deposition or in other pretrial or  
25 trial proceedings: the parties must identify on the record,  
26 during the deposition, hearing, or other proceeding, all  
protected testimony, without prejudice to their right to so  
designate other testimony after reviewing the transcript.

1 Any party or non-party may, within fifteen days after  
2 receiving a deposition transcript, designate portions of  
the transcript, or exhibits thereto, as confidential.

3 (c) Other tangible items: the producing party must affix in  
4 a prominent place on the exterior of the container or  
containers in which the information or item is stored the  
5 word "CONFIDENTIAL." If only a portion or portions of the  
information or item warrant protection, the producing  
6 party, to the extent practicable, shall identify the  
protected portion(s).

7 If timely corrected, an inadvertent failure to designate  
8 qualified information or items does not, standing alone, waive the  
9 designating party's right to secure protection under this agreement  
10 for such material. Upon timely correction of a designation, the  
11 receiving party must make reasonable efforts to ensure that the  
12 material is treated in accordance with the provisions of this  
13 agreement.

#### 14 **V. Challenging Confidentiality Designations**

15 Any party or non-party may challenge a designation of  
16 confidentiality at any time. Unless a prompt challenge to a  
17 designating party's confidentiality designation is necessary to avoid  
18 foreseeable, substantial unfairness, unnecessary economic burdens, or  
19 a significant disruption or delay of the litigation, a party does not  
20 waive its right to challenge a confidentiality designation by electing  
21 not to mount a challenge promptly after the original designation is  
22 disclosed.

23 The parties must make every attempt to resolve any dispute  
24 regarding confidential designations without court involvement. Any  
25 motion regarding confidential designations or for a protective order  
26 must include a certification, in the motion or in a declaration or

1 affidavit, that the movant has engaged in a good faith meet and confer  
2 with other affected parties in an effort to resolve the dispute  
3 without court action. The certification must list the date, manner,  
4 and participants to the conference. A good faith effort to confer  
5 requires a face-to-face meeting or a telephone conference.

6 If the parties cannot resolve a challenge without court  
7 intervention, the designating party may file and serve a motion to  
8 retain confidentiality under Local Civil Rule 7 (and in compliance  
9 with Local Civil Rule 5(g), if applicable). The burden of persuasion  
10 in any such motion shall be on the designating party. Frivolous  
11 challenges, and those made for an improper purpose (e.g., to harass or  
12 impose unnecessary expenses and burdens on other parties) may expose  
13 the challenging party to sanctions. All parties shall continue to  
14 maintain the material in question as confidential until the court  
15 rules on the challenge.

16 **VI. Protected Material Subpoenaed or Ordered Produced in Other**  
17 **Litigation**

18 If a party is served with a subpoena or a court order issued in  
19 other litigation that compels disclosure of any information or items  
20 designated in this action as "CONFIDENTIAL," that party must:

21 (a) promptly notify the designating party in writing and  
include a copy of the subpoena or court order;

22 (b) promptly notify in writing the party who caused the  
23 subpoena or order to issue in the other litigation that  
24 some or all of the material covered by the subpoena or  
order is subject to this agreement. Such notification shall  
include a copy of this agreement; and,

25 (c) cooperate with respect to all reasonable procedures  
26 sought to be pursued by the designating party whose  
confidential material may be affected.

**VII. Unauthorized Disclosure of Protected Material**

If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately: (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and, (d) request that such person or persons execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

**VIII. Inadvertent Production of Privileged or Otherwise Protected Material**

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order or agreement that provides for production without prior privilege review. Parties shall confer on an appropriate non-waiver order under Federal Rule of Evidence 502.

**IX. Non-Termination and Return of Documents**

Within 60 days after the termination of this action, including all appeals, each receiving party must return all confidential material to the producing party, including all copies, extracts and



1 summaries thereof. Alternatively, the parties may agree upon  
2 appropriate methods of destruction.

3 Notwithstanding this provision, counsel are entitled to retain  
4 one archival copy of all documents filed with the court, trial,  
5 deposition, and hearing transcripts, correspondence, deposition and  
6 trial exhibits, expert reports, attorney work product, and consultant  
7 and expert work product, even if such materials contain confidential  
8 material. The confidentiality obligations imposed by this agreement  
9 shall remain in effect until a designating party agrees otherwise in  
10 writing or a court orders otherwise.

11 **X. Summary**

12 Any disputes concerning the terms or implementation of this  
13 Protective Order are to be resolved by this Court.

14 Accordingly, **IT IS HEREBY ORDERED**, the parties' Joint Motion for  
15 a Protective Order, **ECF No. 15**, is **GRANTED**.

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
17 Order and provide copies to all counsel.

18 **DATED** this 23<sup>rd</sup> day of October 2015.

19  
20 s/Edward F. Shea  
EDWARD F. SHEA  
21 Senior United States District Judge  
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